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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

March 14, 1995

FEDERAL EXPRESS

William F. Caton, Acting Secretary
Federal Communications Commission
1919 "M" Street, N.W.
Washington, D. C. 20554

Re: In the Matter of Implementation of
Cable Television Consumer Protection
and Competition Act of 1992,
Cable Home Wiring, MM Docket No. 92-260

Dear Mr. Caton:

Pursuant to Section 1.1200 et seq. of the Commission's rules, Liberty Cable Company, Inc. ("Liberty") hereby submits its ex parte comments which were solicited by the Commission's staff during an informal meeting held on January 18, 1995. These comments respond to the ex parte comments submitted by Time Warner Entertainment Company, L.P. ("Time Warner") in two (2) letters dated January 27, 1995 and a third letter dated February 21, 1995.

While this letter will not address each issue and allegation raised by Time Warner in its ex parte letters, Liberty will, upon Commission request, respond to any of the issues and allegations not addressed herein. In addition, Liberty hereby affirms the veracity of all the statements contained in its January 13, 1995 ex parte letter filed in this proceeding, and is prepared,

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upon request, to provide the Commission with evidence to support each of its claims in that letter and this one.

Liberty strongly objects to Time Warner's gross mischaracterization of the January 18 meeting and its self-serving and erroneous claim that certain "crucial points" were agreed upon. Contrary to Time Warner's misrepresentations, it was abundantly clear during the January 18 meeting that:

- The cable home wiring issue affects hundreds of thousands of multiple dwelling units ("MDU") buildings nationwide and is not a "parochial" problem confined to Liberty and a few buildings in New York City. Time Warner acknowledges as much when it admits that MDU's are the "initial frontier" of telecommunications competition. The Cable Telecommunications Association underscored the significance of Liberty's proposal in its ex parte comments dated January 27, 1995 when it characterized the cable industry's response as "a massive legal and political reaction."

- The adoption of Liberty's proposed demarcation point—where the individual line meet the common line—will promote competition because it give consumers a real and meaningful choice in MDU's.¹ There are numerous technical, economic and practical

¹ Time Warner criticizes the common/individual line terminology as an "invented" term "developed by Liberty to enhance an otherwise specious argument." Time Warner February 21, 1995 letter at p. 9, nt. 4. Actually, it was Congress who first identified "common wiring within the building" as a demarcation point for cable home wiring. See H.R.Rep. No. 628, 102d Cong. 2d Sess. at 118 (1992).
(continued...)

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barriers to installing second cables in MDU's. In most cases, the MDU owner simply will not permit—at any price—a second coaxial installation that clutters the hallways or other public or visible areas of the building. The only way most competitors can install competing systems in MDU's is to place common lines in accessible non-public areas such as the stairwells and then use existing individual lines in the hallways or in the walls.

• The cable industry's plan to use a single coaxial cable to deliver cable and telephone service is irrelevant for purposes of establishing the demarcation point for cable home wiring in MDU's. The cable companies are apparently unwilling to unbundle their cable and telephone service. Instead, they envision each company installing its own wire directly to each telephone and television set in the home and providing bundled cable and telephone services. This obviously gives the incumbent cable operator an insurmountable competitive advantage. This is contrary to the federal policy embodied in 47 U.S.C. § 544(i) that consumers—not the incumbent cable company—control the use of existing coaxial cable in their home.²

¹(...continued)

In a marvelous display of Orwellian doublespeak, Time Warner argues that "common wiring within the building" really means that individual wire in the "common areas" of a building is not cable home wiring. Time Warner February 21, 1995 letter at p. 9.

² Liberty's proposed demarcation point will not, as the cable industry claims, frustrate their introduction of telephone and data services on coaxial cable. The cable industry will be free to deliver telephone and cable services to an MDU on coaxial cable.
(continued...)

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Time Warner complains that "Liberty has appropriated large portions of Time Warner's distribution system—which was paid for by Time Warner" at 182 East 95th Street in New York City. This is false. The owner of the building—not Time Warner—paid to have the wiring installed. Time Warner has been expropriating and using the owner's cable at the building—a fact known and documented to Time Warner. Now that Liberty has entered the building and is using the individual subscriber lines at 182 East 95th Street, Time Warner has actually sued the owner for allowing Liberty to use the cable that belongs to the owner.³ The adoption of Liberty's proposed demarcation point will help eliminate this kind of

²(...continued)

The cable operator can then unbundle those services inside the building for delivery to consumers using the existing coaxial cable and telephone twisted pair wire already available in most MDU units. This gives the consumers the option of buying those services in a bundled or unbundled manner. Or, if the cable operator refuses to unbundle its services, it can try to persuade the homeowner and the MDU owner of the merits of installing yet another coaxial cable on their property. In either event, the inchoate prospect of a cable company putting telephone service on coaxial cable should not put individual subscriber lines beyond the reach of consumer choice. Congress and the Commission have already determined that the consumer should decide who uses individual coaxial cable lines. Liberty's proposed demarcation point merely makes the consumer's decision viable in diverse MDU's.

³ Time Warner has seen the contract in which the owner paid hundreds of thousands of dollars to have all electrical work done at the building, including the installation of the cable system. Time Warner has produced no documents to support its claim that it provided the cable installed at the building. If, as Time Warner claims, it paid \$30 per unit to have an electrician pull wire at the building, then Time Warner was apparently the victim of double billing by the electrician.

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frivolous and anti-competitive litigation by rendering moot any disputes over the ownership of individual lines.

Time Warner complains that Liberty's sales brochure contradicts its position in this proceeding. To the contrary, Liberty's sales brochure clearly sets forth, consistent with Liberty's position, that Liberty installs new and duplicative common lines in the building and then uses existing individual lines to serve individual apartments. The sales brochure states that Liberty connects with "the new vertical wire in each apartment using existing pathways. No new wiring is required within each apartment, so that built-ins and custom carpentry remain perfectly intact."

Time Warner continues its litany of distortions and falsehoods in its January 27 letter addressed to signal leakage and Liberty's alleged shoddy engineering practices. Time Warner claims—incorrectly—that Liberty, as an SMATV operator, is not subject to any signal leakage requirements. The Commission stated In Re: Definition of a Cable Television System, 5 F.C.C.Rcd. 7638 at ¶ 33, nt. 52, that signal leakage by SMATV operators is not unregulated but rather is subject to the signal leakage requirements imposed by 47 C.F.R. Part 15. Liberty complies with those requirements and the signal leakage requirements in 47 C.F.R. Part 78. Time Warner, which has Liberty under a microscope, has

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not cited a single instance of signal leakage by Liberty when Liberty uses existing individual lines or otherwise.⁴

Time Warner presents absolutely no evidence or data to support its contention that Liberty's proposed demarcation point "would inevitably exacerbate signal leakage." The existing cable home wiring demarcation point in MDU's at or about 12 inches outside the unit requires the cutting of cable in many cases if the wire is to be used by a competitor. A common/individual line demarcation point will actually reduce the risk of signal leakage since the entire individual line can be used without being cut.

Liberty also emphatically denies Time Warner's lies that Liberty has illegally broken into Time Warner lock boxes, interfered with the provision of service to Time Warner's subscribers or maliciously removed identification tags from cables. These allegations are not true and Liberty demands a hearing if and to the extent the Commission deems them relevant.

⁴ Time Warner's charge that Liberty has an "arrogant above-the-law attitude" by operating unfranchised "cable systems" in New York City is likewise frivolous. Liberty has filed an action in Federal District Court in New York City seeking deletion of the "common ownership" restriction from 47 U.S.C. § 522(7)(B)—a change in the law which would allow Liberty to freely operate on private property without a franchise. This is the same change in the "cable system" definition advocated by the Commission because it will increase competition. See Annual Assessment of Status of Competition in the Market for the Delivery of Video Programming, 9 F.C.C.Rcd. 7442 at ¶¶ 239 and 252. Time Warner has intervened in Liberty's action and seeks to prevent the change. Time Warner knows that Liberty's operation of "cable systems" in New York City without a franchise was done with the knowledge and approval of City officials and pursuant to a written City policy.

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Liberty does not advocate an "open lock box" demarcation point that could facilitate the theft of anyone's cable service—either Time Warner's or Liberty's. Liberty shares Time Warner's concern about theft of service. But reducing theft of service does not mean placing the demarcation point at a place where neither thieves nor competitors can get access to it (even though Time Warner clearly regards its competitors as thieves). Rather, the Commission should direct the cable operator to facilitate access to any demarcation point in a lock box by sharing keys with other users of the individual line.

Most of the existing junction boxes shared by Liberty and Time Warner have no locks. In those rare instances where locks are present, Liberty is prepared to pay the expense of making duplicate keys so all MVPD's can have access to the lock box consistent with maintaining security.

Liberty emphatically denies Time Warner's bald faced lie that there was a "mess created by Liberty" in junction boxes on the 22nd floor at 200 East 89th Street or 170 East 87th Street. In both cases—and in other similar cases—the "mess" was created by Time Warner itself and existed long before Liberty ever came into the building. The self-serving and inaccurate drawings prepared by Time Warner merely show what Time Warner should have done to properly install its system in the first place. It is not "proof" that Liberty made a "mess" of such an installation. Time Warner's own "mess" shows the farce of its assertion that Liberty's proposed

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demarcation point undercuts Time Warner's ability to meet "rigorous service quality standards."

Time Warner's letter of February 21, 1995 continues its endless barrage of lies and distortions.⁵ Time Warner claims that Liberty pays compensation to River Towers Associates for access to a building located at 420 East 54th Street. In truth, Liberty pays compensation to the landlord not for access to subscribers in the building but to use the building's rooftop for the installation of 18 ghz microwave reception and transmission equipment—a fact well known to Time Warner and referred to in the "Roof Lease" which Time Warner conveniently omitted from its exhibits. Indeed, the landlord insisted Liberty provide service in the building as a condition for the use of the roof as a microwave hub.

Time Warner complains about Liberty "expropriating" its cable. Time Warner ignores the fact that the cable home wiring rules allow the subscriber the opportunity to purchase cable home wiring in the first instance. If the subscriber does not exercise that option, then Time Warner is free to remove the unused individual lines from the conduits and molding leading to the subscriber's unit. Liberty would welcome the removal of Time Warner's unused individual lines from building conduits and molding because this very tiny and limited space is the true gateway to the

⁵ Like Big Brother, Time Warner apparently believes the Big Lie—if repeated frequently—will eventually be accepted as the truth.

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subscriber's unit. The current demarcation point allows Time Warner to plug up that gateway with unused wire.

Liberty is not expropriating or taking anything from Time Warner. The common/individual line demarcation point gives Time Warner a choice--either unplug the gateway or let competitors use the individual line. And, as Liberty has repeatedly stated, Liberty will reasonably compensate Time Warner for the use of the individual line and return the use of the individual line to Time Warner whenever the subscriber wants.

Liberty takes cold comfort from Time Warner's assertion that the multimillion dollar lawsuits it has filed against Liberty's customers are an act of "forbearance." In none of those actions has there been any evidence that any Time Warner subscriber has been denied access to Time Warner's service. Time Warner's tortured and self-serving explanation for this litigation simply does not explain why multimillion dollar damage claims are necessary for any purpose other than to intimidate Liberty's customers.

Time Warner condemns Liberty's "parasitic behavior" in using individual subscriber lines in various MDU's. It is worth noting that Liberty seeks in this proceeding simply to change the demarcation point for cable home wiring in MDU's. Time Warner does not complain about "parasitic behavior" when the demarcation point for MDU cable home wiring is a useless point "at or about 12 inches outside" the unit and thus plugs up conduits and moldings. Time Warner only complains about "parasitic behavior" when Liberty

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proposes a demarcation point that will make the cable home wiring rules really work in MDU's.⁶

Time Warner makes the amazing assertion that the cost of installing individual subscriber lines is "hundreds of dollars" per unit citing a contract to install a cable system in a 273 unit apartment complex in the Upper East Side of Manhattan. That contract includes the cost for the entire system—risers, conduits, common lines and individual lines. It is also the only instance known to Liberty where a building was planned and constructed with horizontal home run conduits large enough to hold two cables.

The invoice submitted by Liberty in its January 13 letter shows the true cost for the labor of installing individual lines--\$30 per apartment. This was the money actually spent fifteen years ago when most of Manhattan was wired.⁷ This capital investment is not lost to Time Warner by operation of the cable home wiring rules. Time Warner might not realize any return on this depreciated investment when a subscriber drops its service. But that is true regardless of whether the subscriber simply moves away or takes another service. And Time Warner continues to get the benefit of its investment when a subscriber returns to Time Warner.

⁶ Time Warner is wrong when it claims that the common/individual demarcation line will "eliminate franchise cable service" at the MDU's. The subscribers always remain free to request the reconnection of their individual lines to Time Warner's service and that in fact routinely happens in buildings served by both Liberty and Time Warner.

⁷ In the case of 182 East 95th Street, it was money unnecessarily spent.

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Thus, Liberty is not "taking" anything away from Time Warner—other than monopoly control over subscribers in MDU's.

Time Warner complains that Liberty's "building-wide or 100% penetration contract"—a so-called "bulk" contract—deprives it of "the opportunity to serve" the building. In truth, all residents in Liberty's "100% penetration" buildings can take Time Warner's service if they want it and some in fact so do. They are able to do so because the consumer controls the individual lines—not Time Warner or Liberty.⁸

Liberty agrees with Time Warner that the purpose of the cable home wiring rules should be to encourage "each competitive provider to construct and maintain their own broadband paths in the MDU buildings."⁹ However, unlike Time Warner, Liberty believes that the subscriber—and not the MVPD—should decide how the individual subscriber lines (which serve only that subscriber) should be attached to the available competing MVPD systems. The common/individual line demarcation point accomplishes this goal by giving the MDU resident a real and meaningful choice.

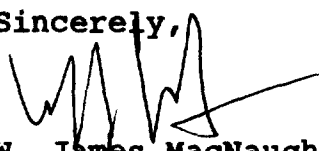
⁸ The great irony of Time Warner's complaint is that Time Warner itself has used "bulk" contracts for years and has significantly reduced its bulk rates as a direct result of competitive pressure from Liberty.

⁹ Time Warner quotes misleadingly from selected excerpts of the deposition testimony of Bruce McKinnon on September 16, 1992 for the proposition that Liberty prefers to have a "separate system." Mr. McKinnon testified in a case in which Liberty considered replacing existing 20 year old MATV wiring with new wires. A reading of the complete transcript shows that Mr. McKinnon was explaining why Liberty did not want to use 20 year old MATV wiring.

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Time Warner's strong opposition to Liberty's proposal shows that its idea of the "facilities-based competition" is that Time Warner controls all the facilities up to the television set (and eventually the telephone) and thereby cuts out the competition. No discussion of facilities-based competition has ever envisioned that multiple cables will run down the hallways of America's MDU's and MDU dwellers will have a plethora of cables in their homes or that television sets and telephones will have multiple jacks where a multitude of "facilities-based" competitors can plug in. Congress explicitly envisioned in 47 U.S.C. § 544(i) that cable subscribers will control the one existing coaxial cable that runs from their television set to the facilities of competing MVPD's. The common/individual line demarcation ensures that right becomes a reality in MDU's.

Sincerely,



W. James MacNaughton

WJM:lw

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